No. 508

UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

GEORGE W. REED, ADMINISTRATOR, ETC., ET AL., *Appellants,*

vs.

JOHN A. STANLY, TRUSTEE, ETC., ET AL., *Appellees.*

Addendum to the Brief of the Trustees of Samuel Merritt Hospital, and John A. Stanly, Surviving Trustee, etc.

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Solicitors for Appellees named.

C. A. MURDOCK & CO., PRINTERS.

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Addendum to the Brief of the Trustees of Samuel Merritt Hospital, and John A. Stanly, Surviving Trustee, Etc.

When the oral argument was concluded in the above case the respective counsel asked and obtained permission to file supplementary briefs. In accordance with that permission the undersigned, Solicitors for the Samuel Merritt Hospital, and John A. Stanly, surviving trustee under the deed of April 21st, 1891, executed by Mrs. Garcelon, present the following:—

I.

In our former brief at page 17, under subdivision III, we made the point that a bill of review ought not to be entertained where, in a case like this, the correctness of

the judgment on the merits is not attacked; but the sole point made is, that the Court was imposed upon in entertaining jurisdiction. We cited no authorities in support of that proposition, but since the oral argument we have tried to read all the cases decided in this country, and referred to in the text-books and digests relating to Bills of Review. In doing so we find that the point made is sustained by the authorities. That a court has not jurisdiction of the action is a matter that may be raised by plea in abatement, and the rule is laid down, both by the Supreme Court of the United States and the text-books, that matters which were or could be reached by a plea in abatement in the original suit cannot be reached by a bill of review, but only on appeal from the original judgment.

Washington Bridge Co. v. *Stewart*, 3 Howard, 413;
Hoffman v. *Knox*, 50 Federal Reporter, 484;
Story's Equity Pleading, Section 411.

The only decision we have been able to find tending to the contrary view is *Ketchum* v. *Farmers' Loan & Trust Co.*, 4 McLean, 1, cited by appellants. But the Court in that case cites no authority, and does not discuss the question.

Washington Bridge Co. v. *Stewart*, 3 Howard, 413, was where the Supreme Court was without jurisdiction of a former appeal in the case, because the appeal was from an interlocutory and not a final decree; but that fact was not called to the attention of the Court. After the mandate of the Supreme Court had gone back to the Circuit Court, and final judgment entered, an appeal

was again taken to the Supreme Court, and upon this second appeal the appellants asked the Court to re-examine the judgment of the Circuit Court, on the ground that the Supreme Court, when it affirmed the judgment, had not jurisdiction. The Supreme Court admitted its lack of jurisdiction on the first appeal, but said: "To permit afterwards, upon an appeal from pro-"ceedings upon its mandate, a suggestion of the want "of jurisdiction in this Court upon the first appeal as a "sufficient cause for re-examining the judgment then "given, would certainly be a novelty in the practice of "a Court of equity. THE WANT OF JURISDICTION IS A "MATTER OF ABATEMENT, AND THAT IS NOT CAPABLE OF "BEING SHOWN FOR ERROR TO ENDORSE A DECREE UPON A "BILL OF REVIEW. SHALL THE APPELLANT BE ALLOWED "TO DO MORE NOW THAN WOULD BE PERMITTED ON A BILL "OF REVIEW IF THIS COURT HAD THE POWER TO GRANT "HIM SUCH A REMEDY? If he was, we should then have a "mode for the review of the decrees of this Court which "have become matters of record WHICH COULD NOT BE "ALLOWED AS AN ASSIGNMENT OF ERROR FOR A BILL OF "REVIEW in any of those Courts of the United States "in which that proceeding is the ordinary and appro-"priate remedy. The application has been treated in "this way to show how much at variance it is with the "established practice of courts of equity."

The case of *Hoffman* v. *Knox* cited above is to the point that where a matter is contested on the trial of the original action, and error complained of could be corrected by appeal, a bill of review will not lie.

Since the oral argument, we have read numerous reported cases upon the subject of a bill of review, and do not recall a single instance where the Court has entertained a bill of review seeking to reverse the decision of the Court below upon any matter that was contested and fought out in the original action. The ground upon which a bill of review can be entertained is that there is some manifest and undisputable error appearing upon the face of the record; but where the question is solely as to whether or not the Court was right in reaching the conclusion it did upon the arguments urged and the evidence adduced, is a matter that can only be corrected by an appeal. It is then, in the language of Chief Justice Fuller, merely a case of "mistaken judgment" on the part of the court.

In the case at bar one of the grounds of contest in the original action was whether the Court had jurisdiction. It was a point fought over from start to finish, and the Court, by its deliberate judgment, decided against the parties who seek by this bill of review to change the decision of the Court. Their contention is that the final decree was an erroneous one. An examination of the authorities will show that bills of review have been entertained only for some manifest error appearing on the face of the record that, in most cases, has crept in inadvertently, and in other cases it was a matter which was not brought to the attention of the Court and passed upon by it. Therefore we contend that, where the error sought to be corrected is upon a contested matter, and the Court has pronounced judgment thereon, the only remedy is by an appeal.

Hoffman v. *Knox* was decided by the Circuit Court of Appeals for the Fourth Circuit and Chief Justice Fuller rendered the opinion of the Court. The Chief Justice cites with approval this extract from the opinion of Lord Eldon in *Perry* v. *Phillips*, 17 Ves. 177: "There is a "great distinction between error in the decree and error "apparent. The latter description does not apply to "merely erroneous judgments, and this is a point of "essential importance; as, if I am to hear this case upon "the ground that the judgment is wrong and that there "is no error apparent, the consequence is that in every "instance a bill of review may be filed, and the question "whether the case is well decided will be argued in that "shape, not whether the decree is right or wrong on the "face of it. The cases of error apparent found in the "books are of this sort, an infant not having a day to "show cause, etc., not merely an erroneous judgment."

Judge Fuller says, in speaking of this rule, "the gen- "eral rule is that such a bill does not lie to correct a "mere error which would in effect render it nothing more "than a substitute for an appeal."

The Court also says:—

"So, also, a decree against the statute law is the sub- "ject for a bill of review, as, for example, a decree di- "recting a legacy to be distributed contrary to the stat- "ute of distributions. (Story, Eq. Pl. Sec. 405.) So "where a decree was entered for the sale of mortgaged "premises, capable of division, to pay the whole mort- "gage debt, when only a small part of the debt was due. "(*James* v. *Fisk*, 9 Smedes & M. 144.) And where a "foreclosure decree was made contrary to the terms of "the mortgage. (*Mickle* v. *Maxfield*, 42 Mich. 304, 3

" N. W. Rep. 961.) These are manifest errors *not open*
" *to controversy*, and while the modern practice has
" tended to allow the court of first instance to review or
" reverse its own decrees, for an erroneous application of
" the law to the facts found, whenever an appellate tri-
" bunal would do so for the same cause, this has cer-
" tainly not been carried so far as to ignore the rule in
" principle. That principle is that the remedy for mere
" error in a final decree is by appeal, and that the error
" apparent for which such a decree may be impeached by
" bill of review must be more than the result of mis-
" taken judgment.

" The ground upon which the Supreme Court of
" Appeals of Virginia proceeded, and the Circuit Court,
" following the rule laid down by that Court, in the
" cases referred to, was that the acts in question, so far
" as they related to supply creditors and to mining and
" manufacturing companies, were unconstitutional and
" void, as in violation of the provision of the State Con-
" stitution that ' no law shall embrace more than one
" ' subject, which shall be expressed in its title.' (Con.
" Va. Art. 5, Sec. 15.) It is ordinarily held that, if the
" subject of an Act be expressed in the title in general
" terms, it will be sufficient under constitutional pro-
" visions like that quoted. The determination of the
" question whether the title of a particular Act is com-
" prehensive enough to reasonably include the several
" objects which the statute assumes to affect is one of
" great delicacy, and upon which opinions might well
" differ; *and a decree rendered upon one view or the other,*
" *while it might be reversed by the appellate court as erro-*
" *neous, can hardly be said to carry that error upon its face*
" *which is required as the basis of a bill of review.*

" *If the question of the validity of these laws was raised*
" *in this case before the rendition of the final decree, and*
" *the Circuit Court erroneously determined that they were*
" *not obnoxious to constitutional objection, the remedy for*
" *such error would have been by appeal*, and we do not
" think that the Circuit Court, because after the lapse of
" the term it arrived at a different conclusion in another

" case, could properly entertain a bill of review to im-
" peach such a decree. The presumption was in favor
" of the constitutionality of the statute and the burden
" of proof on the party setting up its unconstitution-
" ality; *and if the Court, upon its attention being drawn*
" *to the subject, judicially recognized the Acts as valid, that*
" *determined the question for the case, if permitted to re-*
" *main undisturbed without invoking the interposition of*
" *an appellate tribunal.* The fact that nearly 18 months
" after the decree of October 14, 1887, the Court of
" Appeals of Virginia decided these laws to be unconsti-
" tutional for the reason stated, was not enough in itself
" to create error of law apparent, and justify a bill of
" review on that ground or that of new matter *in pais.*"

We have taken the liberty of quoting very fully the language of the Chief Justice in the above case, for the reason that to us it appears plain that the principles there enunciated will not permit the Court to entertain the bill of review in the case at bar. The judgment of the court below that it had jurisdiction may be wrong; it may be erroneous, but it was a question hotly contested before the Court and decided upon grave deliberation. The remedy provided by law is for the aggrieved party to take an appeal. The aggrieved parties here did not do so, and therefore they are not entitled to a bill of review.

II.

Upon the oral argument we laid much stress upon the fact that neither one of the complainants in this bill of review is interested in having the judgment in the original action reversed. We showed that such was the case as to James P. Merritt beyond the shadow of doubt. The only right that he can have to the property involved in the original suit is such right as he derives from being

one of the heirs at law of Mrs. Garcelon. But the record shows that Mrs. Garcelon left a last will and testament by which she disposed of all her estate and excluded him from any interest in this property, and that the only persons who can by any possibility be interested in this property, as against the grantees in the trust deed, are the residuary legatees of Mrs. Garcelon mentioned in her will. We also showed by the record that subsequent to the bringing of the original suit by Bowdoin College and the other complainants, that James P. Merritt had attempted to contest the will of his aunt in the courts of California, and when he did so a motion was made by his present co-plaintiff, George W. Reed, as the administrator of Mrs. Garcelon's estate with the will annexed, asking that the contest of the said James P. Merritt be dismissed on the ground that he had no interest in the estate. We also showed that the Court granted the motion and turned James P. Merritt out of court, and refused to hear his allegations that Mrs. Garcelon was incompetent to make a will, and that she was unduly influenced by John A. Stanly and Stephen W. Purington, the grantees in the deed of trust. The reason that the Court refused to hear him was because of the contracts which he had made with his aunt in November, 1890, whereby for the consideration of $500,000 received by him and his brother from her, they had covenanted with her not to contest any deed or will which she might thereafter make, and further relinquished all interest in her estate. These identical covenants were set out in the original

bill of complaint, in the Circuit Court, and have at all times been relied upon by complainants therein in support of their action against the said James P. Merritt. We also showed that the Supreme Court of California had affirmed this judgment, and that the law of California, Section 1908 of the Code of Civil Procedure, provides that "the effect of a judgment, or final "order, in an action or special proceeding before a court "or judge of this State, or of the United States, having "jurisdiction to pronounce the judgment or order, is as "follows:—

"1. In case of a judgment or order against a specific "thing, or in respect to the probate of a will, or the "administration of the estate of a decedent, or in respect "to the personal, political, or legal condition or relation "of a particular person, the judgment or order is conclu-"sive upon the title to the thing, the will, or administra-"tion, the condition or relation of the person."

The will of Mrs. Garcelon, by the lapse of time, (one year from date of probate,) has, under the laws of California, become final and binding upon all the world. This has been many times decided since the estate of Broderick, reported under the name of *State of California* v. *McGlynn*, 20 Cal. 234. This effectually disposes of James P. Merritt, for the reason that by no possibility can he be benefited by the reversal of the decree in this case.

The argument of the learned counsel for the appellants at pages 30, 31, and 32 of their reply brief, instead of militating against this position of ours strengthens it, for

it is an admission that unless these contracts, entered into between James P. Merritt and Mrs. Garcelon, in November, 1890, are canceled by proper proceedings in a court of equity, he has no further interest in the property involved in this controversy. But he has never made any attempt to obtain any such relief, though he might have done so in his contest of his aunt's will. See opinion of the Supreme Court in *In re Estate of Garcelon*, 104 Cal. at pages 581–582. As he did not do so in that proceeding, he is absolutely cut off from doing so in any other judicial tribunal. His rights as heir have been fixed and established, and under the California system the decision of the Superior Court, sitting in probate is absolutely final.

This leaves only George W. Reed, the administrator with the will annexed of Catherine M. Garcelon. In considering his rights in the premises, the Court must take into consideration the situation at the time the decree herein was pronounced, viz. June 18, 1896. At that time he had brought a suit, as appears from the record here, to set aside the deed that Mrs. Garcelon had made to John A. Stanly and Stephen W. Purington. This suit was brought Dec. 31, 1894, see p. 165, and is the same suit referred to at pp. 274–276. Under the decisions of the Supreme Court of California in *Janes* v. *Throckmorton*, 52 Cal. 368, and *Field* v. *Andrade*, 106 Cal. 107, he could not maintain the action. The only persons, under the California law, who could at that time have maintained such an action were the residuary legatees and devisees of Mrs. Garcelon, to wit: Harry P. Merritt and the estate of

Stephen W. Purington. Neither of these parties complain of the decree.

It appears from the record that Stephen W. Purington, one of these residuary legatees, is one of the grantees under the deed of trust, and that he entered under it. Therefore, under familiar rules of equity, he cannot be permitted to question the deed under which he claimed. The executor of his will was made party to the original suit, but he does not take part as a complainant in this bill of review. Therefore, there is no one at the present time interested in Mrs. Garcelon's estate who has any interest whatever in the question as to whether or not the Circuit Court in the original action decided rightly or wrongly. There is no beneficiary for whom Mr. Reed is acting who can be benefited by his success in the proceeding. The fact that since June 18, 1896, a judgment has been obtained against George W. Reed by a creditor of Mrs. Garcelon's does not improve his situation, for the reason that this bill of review was filed without permission, and does not seek to reverse that judgment on the ground of anything that has been done since its rendition, but only because of error apparent on its face. Besides, the plea filed by the appellees whom we represent shows that this judgment has been assigned to John A. Stanly as surviving trustee.

It is familiar law that a bill of review for matters that have occurred since the rendition of the judgment cannot be filed at all without the permission of the Court, and so far as we know, that permission is only given upon affidavits and upon notice to the other side. An exam-

ination of the books will show that such is the invariable practice.

MR. REED FILES THIS BILL OF REVIEW IN HIS REPRESENTATIVE CAPACITY. WHOM DOES HE REPRESENT? WHAT BENEFICIARY OF HIS WILL BE BENEFITED BY HIS PROCURING THE REVERSAL OF THE JUDGMENT?

There is not a case in the books, so far as we are advised, where a trustee has maintained a bill of review, unless it be for some known beneficiary, who will be benefitted by the reversal of the decree. In truth, we recall no instance, where a trustee has sought to maintain a bill of review of any kind; though we do not wish to be understood as claiming, that in a proper case, a trustee may not maintain such a bill.

In addition, we showed at the oral argument that by the terms of the will itself, under which Mr. Reed claims and which is his only authority, it is plain that Mrs. Garcelon attempted by the will to confirm the previous trust deed that she had made to John A. Stanly and Stephen W. Purington. That will, which is found at pages 87, 88, and 89, must be construed in the light of the circumstances surrounding Mrs. Garcelon at the time she executed it. Those circumstances were :—

(*a*) That she had paid her nephews $125,000 in cash and conveyed to J. N. Knowles, as trustee for them, property of the value of $375,000, upon condition that they should not contest any deed or will that she might thereafter make; and further, the deed of trust to Knowles provided that in case they, or either of them, did make any attack upon any deed or will that she might thereafter make,

that then, and in that event, they should lose their interest in the property, and it should revert to her residuary legatees and devisees. (See trust deed to Knowles, p. 13 of "Exhibits," and pp. 27 and 28, where these particular provisions are found.)

(*b*) She had conveyed substantially all of her property six months prior to the date of the will to John A. Stanly and Stephen W. Purington, wherein she provided for all of her relatives, friends, and dependents and created two great public trusts.

Keeping the above facts in mind, we respectfully submit that no one can read the will of Mrs. Garcelon without seeing plainly that she had the fact before her of the deed of trust to Stanly and Purington, and was desirous of putting it out of the power of any one to question that deed. Observe the provisions that she makes in the first paragraph of her will for her nephews, and her reference to the deed of trust she had made for their benefit to J. N. Knowles. Then observe, by the second paragraph, her understanding that she was not disposing of any property by her will to her residuary legatees, but only appointed them residuary legatees in order that they might recover the property conveyed to Knowles for the benefit of her nephews, in case those nephews violated the agreement they had made with her and should attempt to question the deed of trust made to Stanly and Purington.

Therefore, it is upon two grounds that we insist that George W. Reed, as administrator of Mrs. Garcelon's estate, cannot assert any claim to the property in controversy:—

First: The will, which is his charter, clearly contemplates that he shall support the deed instead of attacking it.

Second: Irrespective of that question he cannot maintain any action to recover the property.

If either one of the foregoing two propositions are correct, then, of course, he has no right to be heard on this bill of review.

Upon the proposition that a party must be substantially interested in reversing the judgment or else he cannot maintain a bill of review, we cite the following authorities:—

Thomas v. *Harvie's Heirs*, 10 Wheaton, 146, is the leading case upon the proposition that a bill of review will not be received after the time has expired within which an appeal might have been taken. In fact, however, the decision upon that proposition was not necessary and is really a dictum, for the reason that the bill of review was dismissed on the ground that the party who brought it could not be benefited by a reversal of the decree. It seems that one Thomas, who filed his bill of review, held the legal title to certain premises, and that a suit had been brought against him by the heirs of one John Harvie to compel him to make a conveyance of this legal title to them. The Court decided in favor of the complainants. Thereafter Thomas filed his bill of review, in which he claimed that John Harvie had no title, and also claimed that before the final decree was passed Harvie had died, leaving a will by which he devised the lands in controversy to two of his sons, and that they

were the parties entitled to such lands as belonged to John Harvie. The bill of review also made some allegations in regard to Edwin Harvie, but what connection Edwin Harvie and his heirs had with the case does not appear fully from the report. In rendering an opinion the Court, after stating the doctrine in regard to the limitation of time within which a bill of review may be exhibited, said that it was not necessary to decide that question, and used this language: —

"Whether a bill of review, founded upon matter discovered since the decree, is in like manner barred by the lapse of five years after such decree, is a question which need not be decided in the present case, since we are all of opinion that it is in the discretion of the court to grant leave to file a bill of review for that cause, and that such leave ought not to be granted in a case where it appears that the plaintiff is not aggrieved by the decree on account of the error so assigned; or, that being granted, the court ought to dismiss the bill where no other error is assigned.

"In this case the court below decided, in the original cause, that the title to the land in controversy was vested in the heirs of John Harvie, and decreed the appellant to convey the same to them.

"If Thomas, then, had no title to the land, of what consequence was it to him that the conveyance was decreed to be made to all the complainants in that cause, as being the heirs of Harvie, rather than to two of them, who, he alleged, were entitled to the land as devisees? If they did not complain of the decree (and that they did not is proved by their plea and demurrer to the bill of review), and if the plaintiff in this bill was not injured by it, the court is at a loss to conceive upon what legal or equitable ground that decree could have been reversed for the errors growing out of the after-discovered evidence. These observations apply equally to the second and third errors assigned."

In *Riggs* v. *Huffman*, 33 W. Va. 426, 10 South Eastern Reporter, 795, it seems that James Riggs, claiming an interest under the will of one Evermont Ward, deceased, was party to a suit brought by the executors for the purpose of construing the will, and afterwards filed a bill for the purpose of reviewing the judgment of the Court. One of the grounds upon which the review was sought was "the said bill on its face is so defective that "no decree can be rendered thereon; does not allege "facts sufficient to give the Court jurisdiction of the "parties." The Court, after stating the facts of the case, and the general principles applicable to bills of review, as laid down by the text-writers and the courts, finally takes up the question as to whether the complainant in the bill of review had such an interest in the estate of Ward as would entitle him to maintain the action. It seems that in the original action he had filed an answer setting up his interest in a certain farm, the title to which stood in the name of the deceased, but held by him really as security for a debt of the complainant to the deceased. The will directed this farm to be sold and the proceeds, after paying the debt, to be paid to the complainant. The Court says:—

"Now, as to the matters complained of in this assign-
"ment of error, beyond what is said of the Riggs' farm,
"it is clear the appellant cannot be heard to complain,
"for the reason that he has not shown such interest in
"himself, as an heir at law or otherwise, as would allow
"him to object to or complain of any disposition that
"may have been made of his property by the testator,
"or any construction that may have been given to said
"will by the Court; and as to such portion of the pro-

" ceeds of said Riggs' farm as may belong to the estate " of said Ward, he cannot be heard in raising an objec- " tion to the decree of the Court construing the tes- " tator's intention and directing the manner of its dis- " tribution, because he has not shown himself interested " as an heir at law or distributee. Having concluded " that the appellant in his bill of review has not shown " himself entitled to such interest in the estate of said " decedent as would allow him to present such a bill, we " are relieved from discussing many of the points which " have been so ably presented by counsel for appellant, " and among them in passing upon the errors complained " of in the rulings of the Circuit Court in construing the " will of said decedent."

Webb v. *Pell*, 3 Paige's Chancery Reports, 368, was a bill of review attacking a decree made by Chancellor Kent in a case where Harvey Elliot was plaintiff and Aaron Pell and wife and others were defendants. The original bill was for the foreclosure of a mortgage, and the Court held that there was due to the complainant in the original bill, (Harvey Elliot) $968.32, and to Aaron Pell and wife $1311.56. It also appeared from the bill of review that the premises covered by the mortgage had been sold under the decree for $1300. The bill of review was brought by certain co-defendants other than Aaron Pell and wife, who seemed to admit the validity of the first mortgage given to Elliot. The purpose of their bill of review was to attack the second mortgage, and being the one to Aaron Pell and wife. Chancellor Walworth, in passing upon the bill of review, said, page 372: " I have serious doubts whether the " decree could have been sustained in its present form on " appeal, if such appeal had been entered in time." But it

seems that because the property had only sold for about enough to pay the first mortgage Chancellor Walworth was of opinion that a bill of review could not be entertained for the purpose of showing that the second mortgage, and being the one in favor of A. Pell and wife, was invalid, notwithstanding the error of the Court in the original action declaring it to be a lien upon the real property.

This is what the Chancellor says:—

"It is also doubtful in this case whether the present "complainants have shown such an interest in the con- "troversy, as it now stands, as to entitle them to review "this decree. No person can file a bill of review "who has no interest in the question intended to be "presented by such bill, or who cannot be benefited by "the reversal or modification of the former decree. "Here it appears that the property has been sold under "the decree, and the proceeds of that sale are the whole "subject of controversy. Even if A. Pell and wife are "excluded from a share of such proceeds, it is admitted "that the executor of Elliot is entitled to his debt and "costs out of the fund before these complainants can "receive anything. There was nearly $1,000 due to "Elliot in May, 1824, which, with the interest thereon "to November, 1827, when the proceeds of the sale were "directed to be invested, would amount to about the "$1,300, for which the property was sold, exclusive of "costs. And these complainants cannot litigate the "cause for the benefit of Elliot's executors. The plea "and demurrer must be allowed, and the bill must be "dismissed, with costs."

" No party to a decree can, by the general principles " of equity, claim a reversal of a decree upon a bill of " review, unless he has been aggrieved by it, whatever " may have been his rights to insist on the error at the " original hearing or on an appeal."

Judge Story, speaking for Court, in *Whiting* v. *Bank of U. S.*, 13 Pet., at p. 14.

Courts will not entertain bills of review for new matter unless the new matter, according to Lord Talbot, is " a " receipt, release, or like evidence in writing, so that a " vexatious person may not resort to a bill of review for " the oppression and delay of his adversary."

That also is the language of Chancellor Kent, *Livingston* v. *Hubbs*, 3 Johns Ch. 124.

The Supreme Court of Appeals of Virginia lays down this rule. "A bill of review can only be filed by a person " who was a party or privy to the former suit; and even " persons having an interest in the cause, if not aggrieved " by particular errors assigned in the decree, cannot " maintain a bill of review, however injuriously the " decree may affect the rights of third persons. *Nor* " *can it be filed by persons who cannot be benefited by the* " *reversal or modification of the former decree.*"

Heermans v. *Montague*, 20 S. E. 899, see p. 903.

" No party to a decree can, by the general principles " of equity, claim a reversal of it upon a bill of review, " unless he has been aggrieved by it, whatever may have " been his right to insist on the error at the original " hearing or on appeal. *The bill must show by proper* " *allegations that the party filing it is interested in the*

"*matter disposed of by the decree, what those interests are,* "*and that he will be benefited by a reversal or modification* "*of the decree.*" Beach on Modern Equity Practice, Section 872.

To the same effect is Story on Eq. Pl., Section 409.

In the following cases bills of review were dismissed because the complainants were not in a position to be benefited by reversal of the decree.

Winchester v. *Winchester*, 1 Head, 460;
Montgomery v. *Olwell*, 1 Tenn. Ch. 169;
Laidley v. *Kline*, 25 W. Va. 208.

In *Hall* v. *Huff*, 76 Geo. 337, a bill of review was dismissed because the party had appealed, though the appeal was dismissed.

We cannot close this discussion better than by referring to the decision and the reasons given by the Court in *Ricker* v. *Powell*, 100 U. S. page 104. It was an appeal from an order of the Circuit Court refusing the appellant Ricker leave to file a bill of review. The original action was one for the foreclosure of a mortgage. There was no defense as against the mortgagee's claim in the foreclosure suit, but there was a fight between the different defendants as to the order in which different pieces of land should be sold for the purpose of satisfying the mortgage. One of the defendants appealed to the Supreme Court; that Court rendered a decision, and thereafter granted a rehearing, but finally concluded to stand by its original decision. Then Ricker asked for leave to file a bill of review, in the court below, which the court

denied. Upon appeal to the Supreme Court the Court affirmed the order, for the reason that by granting it injustice would be done to the mortgagee, who had already been kept out of his money for nearly five years because of the litigation between the defendants as to the order in which their respective pieces of property should be sold.

CONCLUSION.

As the result of the examination of many authorities, *and assuming that the bill is filed in due time*, we feel we are safe in saying, that the remedy by bill of review, to correct errors in an equity case, is never allowed unless it clearly appears from the record, that a plain, apparent error has been committed, vitally affecting the substantial rights of the complainant; that it is not allowed where the judgment is erroneous because the facts did not warrant it, or where the court, after its attention was called to the question, misapplied or wrongly construed the law, or where the error was in matter of form, or was matter of abatement, or where the complainant is an assignee of the party to the original suit, or where he is not substantially prejudiced by the judgment.

In short, the Court never allows a bill of review unless a manifest injustice or wrong will be committed if the original judgment is permitted to stand. A reading of the cases where bills of review have been sustained will show that in every instance it was clear that a wrong had been done or such a mistake made that substantial justice, as between man and man, required it to be righted.

Take the case of *Ensminger* v. *Powers*, 108 U. S. 292, so much relied upon by appellants here to show that they were in time in filing their bill of review. A bill of review ought to have been sustained in that case if possible to do so. The head-note to the case leaves out of view the fact that at the time the Judge refused to hear the plaintiff and directed the judgment to be entered for the defendant (claimant), without a trial, it was expressly stated by the counsel for the defendant (see page 300) that if there were other questions in the case than the one which had been decided by another judge, the point could be raised by a bill of review and the decree set aside. The counsel for the plaintiff "objected that a bill "of review would not lie, and insisted on a determination "of the question by the Court whether this case came "within Judge Emmon's order for the entry of decrees; "and thereupon the Court decided that the counsel for "the claimants should enter decrees in such cases as he "designated, as under the undertaking with his brother "Emmons he had only to direct such decrees to be "entered as the counsel should determine."

From this it appears that it was understood that if the facts and the evidence in another case did not apply to the one before the Court, the Court would entertain a bill of review, and set aside the judgment.

At page 301 the Court says:—

"It appears that, against the objection and exception "of the counsel for the city, who represented both of the "plaintiffs in the suit, the plaintiffs were denied by the "court a hearing of the case on the merits, and the judge "holding the court refused to decide whether the case

" fell within the prior decision or order of Judge Em-
" mons, and allowed the counsel for the defendant to de-
" termine that question. . . . What, then, does it
" show, except that the proper forms of the administra-
" tion of justice were disregarded, the functions of the
" judge were abnegated, there was no hearing or decision
" by the court, and the counsel for the defendant was
" allowed to prepare and enter such a decree as he chose.
" Words need not be multiplied to argue that a decree
" rendered under such circumstances must, on a bill of
" review, be held for naught, and as if it did not
" exist."

Of course, such a decree should be held for naught. The Supreme Court said, page 302: "There was no judicial action by the Court and the defendant was allowed virtually to decide the case in his own favor."

The only question really to be decided in that case was as to whether the bill of review was filed in time, and one can hardly conceive of a court of justice not straining a point in order to give the injured party, in such a case, relief.

We have not discussed in this brief, nor in the one to which this is a supplement, the question of jurisdiction, because we feel confident that it is unnecessary. Under all the authorities, as we understand them, the Court will not, *upon a bill of review*, and upon the facts as presented by the record, go into that question. We insist that this bill of review was not filed in time. If it were, still, for the reasons heretofore given, the Court will not look into the merits of the judgment of the court below, a judgment reached after much discussion and careful

consideration. Regarding the case from this standpoint, and abler counsel than we having discussed the question of jurisdiction fully on behalf of Bowdoin College, we submit the case with this suggestion on that point viz.: An examination of the authorities justifies the statement that a court of equity will entertain a bill of complaint brought by a beneficiary against a defendant asserting claims hostile to the trust, provided the trustee will not himself enforce his right as such trustee against the party asserting the adverse title. But in such case it is necessary to make the trustee a party for one reason, and one reason alone, and that is, in order to bind the trustee so that he will not be free himself to bring another action in his representative capacity against the defendant. The rule is for the benefit of the defendant so that he may not be troubled by two suits. The trustee is therefore a mere formal, though necessary, party; made necessary in order to protect the defendant from another action. But in such case there is no relief sought as against the trustee; the purpose of the action being simply to enjoin the defendant from asserting a hostile claim. The action can proceed without the trustee, and as full relief obtained as if he were not a party. Solely for the purpose of preventing the defendant being vexed by another action, the rules of equity require the trustee to be brought in. In no such case as that can the Court arbitrarily arrange the trustee along with the complainant so as to oust the Court of its jurisdiction. And in no such case, so far as we are advised, has a Court attempted to do so.

It will be found in an examination of the cases cited by the appellants here, where the court has arranged the parties and placed the trustees on the same side with the beneficiaries, it has been done because the trustees were more than formal parties, and were absolutely required to take affirmative action under the judgment sought for, in order to carry out the trust.

If this principle is kept in mind, we believe it will show there is no conflict between the decisions cited by the appellants and those cited by the counsel for Bowdoin College. The cases where a stockholder in corporations has been allowed to bring a suit against parties claiming adversely to the corporation, though making the directors and the corporation formal parties, are peculiarly in point, because no relief was sought other than to enjoin parties from asserting hostile claims.

It seems to us that the late cases of *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362, and *Smyth* v. *Ames*, 169 U. S. 466, are directly in point. These decisions are subsequent in date to brief of Judge Hayne which we reprinted in our first brief.

Shipp v. *Williams*, 62 Fed. Rep. 4, is the strongest case cited by appellants. But that was a suit brought by the beneficiary against trustees holding the title to land as security for a debt, and also against the debtors for the purpose of enforcing the trust, and requiring the trustees to sell the property in order to carry out the trust. That is a very different case from one like this, where nothing whatever is required of the trustees, and

the only purpose of the action is to enjoin the other defendants from asserting title to the trust property. It is against them, and them alone, that relief is sought. It is not an action to enforce the trust, but to enjoin its assailants, where the trustee refuses to act, and the beneficiaries are compelled to take action for their own protection.

We respectfully insist that as, in such case, the rules of equity required Bowdoin College, the complainant, to make the trustee a party, in order to protect the defendants from any other suit that the trustees themselves might see fit to bring, that it would be most unjust for the Court to arbitrarily arrange the trustees on the side of the complainants and thereby oust itself of jurisdiction of the action. To do so is manifestly opposed to equitable principles, and we insist upon it that there is no rule of law or of decisions requiring it.

The Court in *Shipp* v. *Williams*, distinguishes that case from *Wallen* v. *Skinner*, 101 U. S. 577. It seems to us that the last-named case went further to sustain the jurisdiction of the Court than is required to attain the same end in the case at bar. In that case the executors of a deceased trustee, and who, under the statute of Georgia, were his successors, were made parties in the suit brought by the beneficiary to secure the reformation of the deed of trust and a conveyance from the successors of the trustee. The real contest was between the complainant and the defendant Skinner, who claimed the property adversely to her. The Court held

that as it had clearly jurisdiction of the controversy as between the complainant and Skinner, that the successors of the trustee were merely formal parties even though a deed from them was necessary, and their presence did not oust the Court of jurisdiction (pp. 588–589).

Judge Story, speaking for the Court, in *Wormley* v. *Wormley*, 8 Wheat. p. 451, said: "This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties." In that case the female plaintiff made her husband, who was a citizen of the same State with the other defendants, a party defendant. He was a necessary but formal party.

See also—

Woodbridge v. *McKenna*, 8 Fed. Rep. pp. 668–669;
Pond v. *Sibley*, 7 Fed. Rep. 129;
Taylor v. *Holmes*, 14 Fed. Rep. 514.

We appear in this action for The Samuel Merritt Hospital, one of the great public trusts attempted to be created under the deed from Mrs. Garcelon to John A. Stanly and Stephen W. Purington. The trustees for this trust were not parties to the original suit, but properly have been made defendants in this bill of review. No argument or statement is necessary to show the interest of these trustees in maintaining the judgment that has been rendered and stopping any further litigation in the premises. They speak not only for themselves, but for the cause of a noble charity.

We also appear for John A. Stanly, as the surviving trustee, who is also made a party defendant in this bill of

review by the complainants, and we stated in our opening brief the interest that John A. Stanly has as such surviving trustee in this Court affirming the judgment of the court below.

Respectfully submitted,

OLNEY & OLNEY,

Solicitors for Appellees named.